

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL KIRSCHBAUM and	:	CIVIL ACTION
HELEN KIRSCHBAUM	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WRGSB ASSOCIATES and THE	:	
BALCOR COMPANY,	:	
Defendants,	:	
	:	
v.	:	
	:	
INSIGNIA COMMERCIAL GROUP,	:	
INC.	:	
Third Party Defendant.	:	NO. 97-CV-5532

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**June , 1998**

Presently before the Court is the Motion of Defendants, WRGSB Associates and The Balcor Company, to Quash Plaintiffs' Subpoena Issued to The Travelers Insurance Company ("Travelers") and for Protective Order. This action arises out of a slip and fall in a building owned by the Defendants. Travelers insures both BR Management,<sup>1</sup> a non-party, and the Defendants in this matter.

On May 20, 1998, the Plaintiffs issued a subpoena directing Travelers to produce its "entire claims file pertaining to your insured BR Management and further, the entire Claims File concerning the management of the GSB Building and, in particular, concerning the 9/12/95 slip and fall accident involving Dr.

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<sup>1</sup> Neither party explained the role of BR Management in this case.

Michael Kirschbaum." On May 22, 1998, counsel for the Defendants responded with a letter stating that the subpoena violates Federal Rule of Civil Procedure 26(b)(3) because it requests protected work product. The letter stated that if the subpoena was not withdrawn by 5:00 p.m. that day, Defense counsel would file a Motion for a Protective Order and seek costs and sanctions.

The law in this area is relatively clear. Rule 26(b)(3) states, in pertinent part:

**Trial Preparation: Materials** . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's . . . insurer) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3). The Plaintiffs do not claim "substantial need" or "undue hardship."

Documents created by an insurer, on behalf of a party and in anticipation of litigation, are work product protected from disclosure under Rule 26(b)(3). There is no blanket protection for an insurer's claims files, as Defendants assert. Only documents prepared in anticipation of litigation are protected work product. Documents created on behalf of a non-party are not protected by the work product rule. The rule exists to protect

the privacy of the preparations of the attorneys and agents engaged in litigation. There is no reason to extend this protection to a non-party.

Therefore, the Plaintiffs are entitled to discover relevant documents prepared on behalf of Travelers' clients who are not parties to this litigation. The Plaintiffs are not entitled to discover documents prepared by Travelers in its capacity as insurer for the Defendants in this matter, if the documents were prepared in anticipation of litigation.

Instead of resolving this dispute in a professional manner, under the law outlined above, both parties decided to engage in a needless discovery dispute. First, the Plaintiffs invited a dispute by issuing their subpoena on May 20, 1998, with a return date of May 27, 1998. May 25, 1998, was Memorial Day. At most, Plaintiffs allowed three business days for response to their subpoena.

In addition, Plaintiffs' request was overly broad. Instead of simply requesting documents relating to BR Management, Plaintiffs requested "the entire Claims File concerning the management of the GSB Building and, in particular, concerning the 9/12/95 slip and fall accident involving Dr. Michael Kirschbaum." To further confound matters, the Plaintiffs' cover letter uses the claim identification number that Travelers uses for this

litigation. This casts doubt on Plaintiffs' subsequent claim that they were only seeking documents relating to a non-party.

The Defendants exacerbated the dispute. Counsel for the Defendants did not comply with Federal Rule of Civil Procedure 26(c) and Local Rule of Civil Procedure 26.1(f). The Local Rule states:

No motion or other application pursuant to the Federal Rules of Civil Procedure governing discovery . . . shall be made unless it contains a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute.

E.D. Pa. Local Rule 26.1(f). One letter, demanding that an opponent withdraw their discovery request, is not a "reasonable effort" to resolve a discovery dispute.

In addition, the Defendants did not comply with their duty under Rule 26(b)(5), which states:

**Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is . . . subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself . . . protected, will enable other parties to assess the applicability of the . . . protection.

Fed. R. Civ. P. 26(b)(5). The Defendants letter to the Plaintiffs and Motion to Quash simply state that all documents requested by the subpoena are work product. Without some description of the documents withheld, there is no way for the

Court or the Plaintiffs to evaluate the claim of work product protection.

The Defendant's Motion to Quash is denied without prejudice. The parties are directed to meet and make a reasonable effort to resolve this dispute. The Plaintiffs shall clearly identify the documents that they seek. The Defendants shall then produce all documents which are not privileged or protected by the work product rule. If the Defendants withhold any responsive documents on the grounds that they are privileged or work product, they shall describe the nature of the documents withheld and the grounds for withholding them.

Federal Rule of Civil Procedure 1 states that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. If the parties continue to violate the Rules of Civil Procedure and basic professional courtesy, the Court will consider appropriate sanctions.

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INSIGNIA COMMERCIAL GROUP,	:	
INC.	:	
Third Party Defendant.	:	NO. 97-CV-5532

**ORDER**

AND NOW, this        day of June, 1998, upon consideration of the Motion of Defendant's, WRGSB Associates and The Balcors Company, to Quash Plaintiffs' Subpoena Issued to The Travelers Insurance Company ("Travelers") and for Protective Order and the responses thereto, it is ORDERED that the Motion is DENIED without prejudice.

BY THE COURT:

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JAMES MCGIRR KELLY, J.